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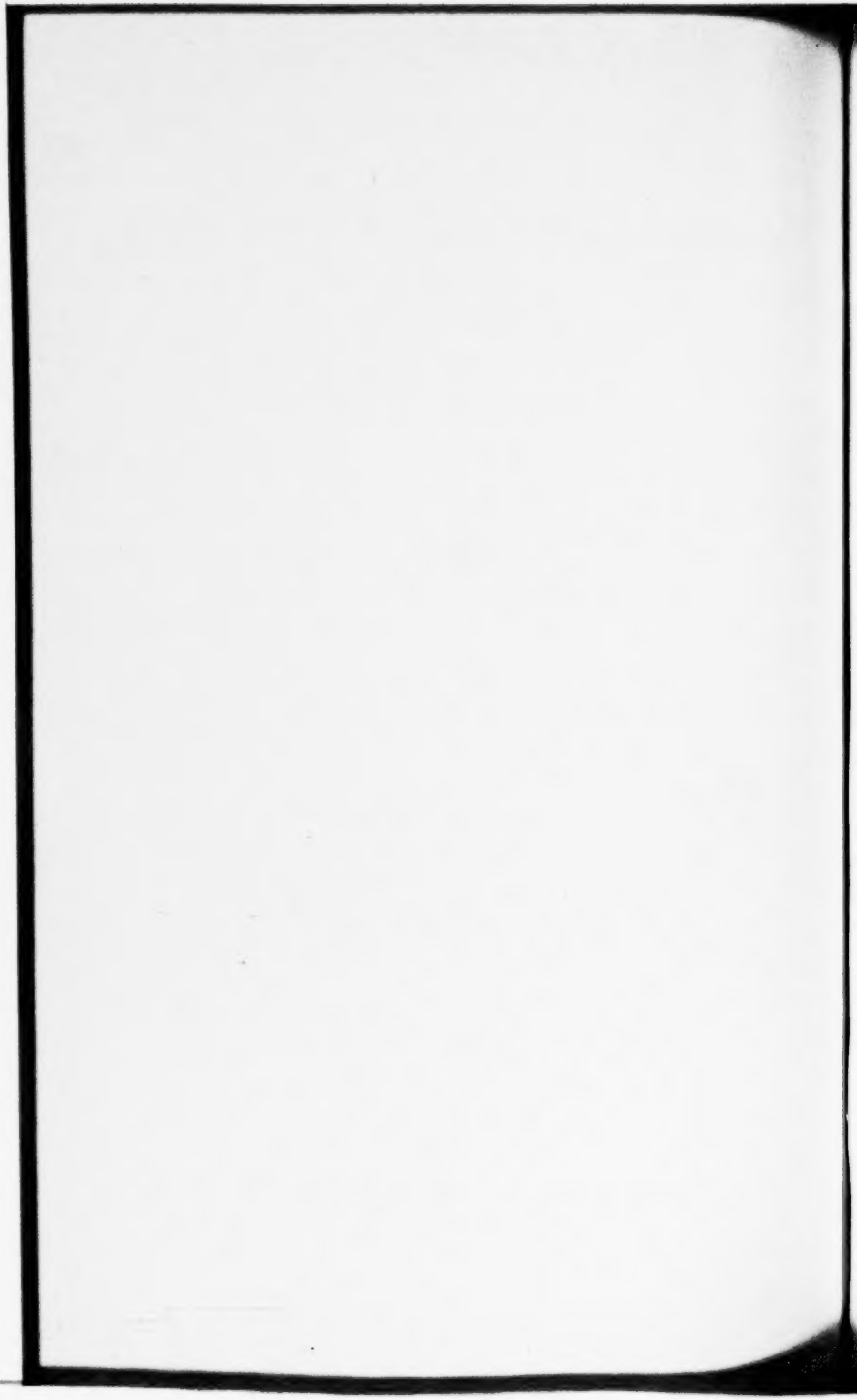
FEBRUARY TERM, 1950.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION for a Writ of Certiorari,
Petitioner,
against
THE CITY OF BUFFALO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Counsel for Petitioner,
109 Broad Street,
New York City 4, New York.

BATAVIA TIMES, LAW PRINTERS.
BATAVIA, N. Y.



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IN THE

Supreme Court of the United States

No. .....

FEBRUARY TERM, 1950.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION for a Writ of Certiorari, addressed to the Judges of the Court of Appeals, Second Circuit,

Petitioner,

against

THE CITY OF BUFFALO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

And now comes the Plainfield Hotel Corporation of New Jersey, a real property holding corporation, and gives this Honorable Court to understand and be informed as below set forth, and on its own behalf as owner of an interest

in real property in the City of Buffalo near Houghton Park, makes this petition against the Honorable John Knight, Judge of the District Court of the United States for the Western District of New York, and against the other judges and officers of said Court and of the Court of Appeals for the Second Circuit, and represents as follows:

1. Your petitioner prays that a Writ of Certiorari to review the orders and decrees of the said Courts after a rehearing filed November 22, 1949, confirming the order of the District Court of the United States for the Western District of New York.

2. The opinion of the Court below decided November 2, 1949 in the said Court of Appeals, and the decision on the rehearing filed November 22, 1949, for convenience, are printed in an appendix to the brief which is filed with this petition.

3. Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1924, 43 Stat. 938, now Sec. 1254 U. S. C. A. new Title 28 (1948) (revision).

4. The opinion of the Court of Appeals for the Second Circuit was filed November 2nd, 1949 and petition for rehearing was filed November 22, 1949, no opinion on rehearing, and decree was entered.

Question Presented.

5. The fundamental questions presented in this petition are whether a County Court of the County of Erie in the State of New York, having before it a bill of complaint which names a defendant, a corporation of the State of New Jersey, found by the Court to have such rights and

interests in the subject matter of the litigation, namely real property, as would make it an indispensable party, may proceed to adjudicate its said rights in its absence, except for a Special Appearance, objecting to the jurisdiction because of non-service on an officer or director of said New Jersey corporation, without a hearing as provided by the Civil Practice Act of New York State.

As applied to the statutes under which the action was brought, the question is whether the New York State Tax Law Section 162, which provides one year for redemption after sale for taxes, by the owner, the plaintiff, City of Buffalo, may foreclose without notice as required by Rules 188, 190, 191, 192, and 230 of Rules of Civil Practice requiring the plaintiff to give notice of the entry of an order, and the entry of judgment thereon, and when defendant is a foreign corporation, as held adversely in *Powell vs. Home Seeker Realty Company,* 131 Misc. 590, 228 N. Y. Supp. 131. In disregard to said Rules and statutes, plaintiff entered judgment without a trial and without the required notices, and on an alleged default which did not occur because the time to answer had not commenced to run when no notice of the order or decision sustaining the service had been given. On appeal to the New York State Appellate Division the service of the summons was sustained without opinion, but notice of this decision was not served on your petitioner as required by the said Rules of Practice. Because of failure to serve copies of the orders of the County Court and Appellate Division, defendant, your petitioner had no time limit in which to file an answer to the complaint, and therefore was not "in default."

Petitioner had moved to open the alleged default and vacate the judgment by order to show cause with stay, but the sale of the property was held before the return

date stated in the said order to show cause. Petitioner attended the sale and made the highest public bid of buyers, also appearing specially, to buy in the property, but the City made a higher bid, which the local Referee accepted. Your petitioner thereby was deprived of its property without due process of law. A petition for removal to the United States District Court was then presented because of the acts of prejudice and local influence shown in the County Court. The District Court Judge held that the petition for removal had not been filed in time, holding that the alleged default was a "trial" of the action, but that Court overlooked the fact that there was *no notice* of hearing before the Referee in the County Court also that the *judgment was entered without notice* or *any notice of entry thereon,* and that the motion to vacate the alleged default judgment was denied by the County Court when these facts were before said Court. Such failure to give notice is held to be error in the case of Marking vs. New St. Lewis, 48 Fd. Supp. 680. If follows that from the County Clerk's record, the twenty days to answer, had not commenced to run when the petition for removal was filed and served, because *notice of entry and judgment* had *not been served,* and because the order of the Appellate Division on validity of service had not been served with notice of entry as rules require. Also, so held in Harter vs. Kernochan, 103 U. S. 562. It appears of record that the service of the summons was not filed until about seven months after the summons and complaint were filed. As there was no notice of hearing to the alleged default judgment, there could not have been a legal hearing or "trial."

Powell v. Home Seeker Realty, *supra.*

Petitioner in its proposed answer in the County Court alleged that the Charter of the City of Buffalo and Tax Law of New York provide a period of one year for the redemp-

tion of real property after sale for taxes, and tendered payment of such taxes and interest and costs accrued, and for this reason, petitioner did not receive "due process of law" as provided in the Constitution of the United States and of the State of New York.

Petitioner respectfully submits that the County Court never acquired jurisdiction of the petitioner-defendant, as held in the case of Conly vs. Mathieson, 190 U. S. 406, that the officer served, must be officially representing the corporation in its business within the state where service is made. Also held in Fitzgerald vs. Fitzgerald, 137 U. S. 98 and St. Clair vs. Cox, 106 U. S. 350.

The said judgment was voidable and can be vacated because it was entered without notice as required Rules of Civil Practice 188 and 190, and as held in Powell vs. Home Seeker Realty Co., 131 Misc. 590, 228 N. Y. Supp. 131, Selinger vs. G. C. Inc., 81 Misc. 343, 142 N. Y. Supp. 194.

WHEREFORE it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the Second Circuit, should be granted.

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Attorneys for Petitioner.

To Fred C. Maloney, Esq.,
Counsel for Respondent, The City of Buffalo.

YOU ARE HEREBY NOTIFIED that on the 21st day of February, 1950, the petitioner, Plainfield Hotel Corporation, filed in the Supreme Court of the United States, a petition for review on Writ of Certiorari of the decision of the Court of Appeals for the Second Circuit in the case in that Court in which Petitioner is Appellant and Respondent is Appellee, being cause No. 21337 on the docket of said Court.

Copy of said petition, of the printed record in said cause and of the brief in support of said petition are annexed or submitted herewith and are herewith served upon you.

Dated: January 27th, 1950.

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Attorneys for Petitioner.

Service of the foregoing notice and of copies of the petition, brief and record therein specified is hereby acknowledged.

FRED C. MALONEY,
Attorney for Respondent.

February ....., 1950.

Opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20—October Term, 1949.

(Argued October 14, 1949 Decided November 2, 1949.)

Docket No. 21337

THE CITY OF BUFFALO,
Plaintiff-Respondent,

—against—

PLAINFIELD HOTEL CORPORATION,
Defendant-Appellant,

SPANN REALTY CORPORATION, E. W. WALTER, as nominee of CENTRAL HANOVER BANK AND TRUST COMPANY, THOMAS J. ATCHESON, doing business under the assumed name and style of T. J. ATCHESON GLASS CO., STATE TAX COMMISSION, THE PEOPLE OF THE STATE OF NEW YORK, BUFFALO SEWER AUTHORITY, COUNTY OF ERIE,
Defendants.

Before:

AUGUSTUS N. HAND, CHASE and FRANK,
Circuit Judges.

Appeal from an order of the District Court for the Western District of New York denying a petition for the removal of a suit in the state court. Affirmed.

FRED C. MALONEY, *Attorney for Plaintiff-Respondent.*

JAMES P. KOHLER & JAMES P. KOHLER, JR., *Attorneys for Defendant-Appellant, Plainfield Hotel Corporation, Appearing Specially.*

CHASE, *Circuit Judge:*

In October, 1946, the City of Buffalo brought suit in the County Court of Erie County, New York to foreclose tax liens upon real estate within that city upon which the appellant, a New Jersey corporation, had a mortgage lien or in which it may have had some interest. The appellant among others, was made a party defendant and service of summons was made upon it in February 1947. This service it sought to have vacated after entering its special appearance for that purpose in the state court suit. Its effort was unsuccessful and in December, 1947, on appeal to the Appellate Division of the New York Supreme Court the order denying its motion to vacate was affirmed. *Buffalo* v. *Plainfield Hotel Corp.*, 273 App. Div. 802. The appellant did not otherwise appear in the state court action.

On or about February 10, 1948, the state court referred the action to a referee for hearing and report on questions of fact and law. The referee filed his report, after hearing, on April 30, 1948. On the same day, the state court entered a judgment of foreclosure and sale, the judgment going against the appellant by default. A motion by the appellant to open the default was dismissed. After the denial of the motion to open the default the property was, on May 26, 1948, sold pursuant to the order of sale.

On August 16, 1948, the appellant filed its petition in the district court for removal, alleging as grounds diversity, a constitutional question, a separable controversy, and prejudice and local influence in favor of the plaintiff and adverse to appellant, the petitioner. The appeal is from an order of September 14, 1948 denying that petition.

As the new Judicial Code did not take effect until September 1, 1948, that is, after the petition for removal was

filed, the old Judicial Code seems applicable.[1] Section 29 of the old Code, 28 U. S. C. § 72, required the filing of the petition for removal in the state court "except [in] suits removable on the ground of prejudice or local influence" and, with the exception noted, that was the exclusive method of obtaining removal. The district court could remand a cause improperly removed by order of the state court but its power to order removal in the first instance was confined to the ground of "prejudice or local influence" and its power so to act flowed from Section 28 of the Old Judicial Code, 28 U. S. C. § 71. These two sections, 28 and 29, of the old Judicial Code were *in pari materia* and should be so construed. *Ex parte Bopst,* 4 Cir., 95 F. 2d 828. For this reason the court lacked the power to grant the petition for removal on any of the grounds stated except that of prejudice and local influence.

However, it might not be amiss to point out that the appellant lost nothing by its failure to file its petition in the state court at the time it was filed in the district court. It was too late then to petition the state court for removal on the grounds permitted by Section 29, for its time to answer or plead to the complaint in the action had then expired. The service upon it had been held good; its time to answer in compliance with Section 263 of the New York Civil Practice Act had expired; and there is nothing to show that it had been extended. We cannot assume that such a petition to the state court would have been granted. Even if it had been, however, the district court should, and doubtless

[1] It may be noted that under the new Judicial Code, local prejudice or influence is not a ground for removal. 28 U. S. C. A. § 1441; see Revisers' Notes to that section. Petitions for removal on the grounds that are available must be filed in the district court within twenty days after commencement of the action or service of process, whichever is later. 28 U. S. C. A. § 1446(b). Here, when appellant's petition for removal was filed, the twenty day period after service of process, which was the later, had long since expired. Thus, if the new Judicial Code were applicable, appellant's attempt to remove would have been too late.

would upon motion, have remanded the suit. *Quilhot* v. *Hamer,* C. C., N. D. N. Y., 158 Fed. 188. And its order would not have been reviewable. *Moulding-Brownell Corp* v. *Sullivan,* 7 Cir., 92 F. 2d 646, cert. denied, 305 U. S. 638; *Ex parte Bopst, supra.*

The only remaining question is whether the petition treated as one based on prejuidce and local influence should have been granted and the answer is found in the fact that it was filed too late. Section 28 of the old Judicial Code required such a petition not only to be filed in the district court but to be filed there "at any time before the trial thereof." Before this petition was filed, however, the suit had been tried in the state court by reference to a referee who had after hearing filed his report and judgment had been entered. The decision, provided valid service had been made upon the appellant, had become final and the judgment of foreclosure had been followed by the sale of the property. Appellant claims that the Appellate Division erroneously affirmed the order denying its motion to vacate the service. However, a decision relating to jurisdiction either of the person or of the subject matter is not subject to collateral attack where it was made in proceedings in which the jurisdictional questions were in issue and in which the parties were given full opportunity to litigate.[2] *Baldwin* v. *Iowa State Traveling Men's Association,* 283 U. S. 523; *Stoll* v. *Gottlieb,* 305 U. S. 165 (1938). Parenthetically, such a decision is in addition entitled to full faith and credit in the courts of another state, *Sherrer* v. *Sherrer,* 334 U. S. 343, and consequently in the courts of the United States. See *Pennoyer v. Neff,* 95 U. S. 714, 733; *Huron Holding Corp.* v. *Lincoln Mine Operating Co.,* 312 U. S. 183. Right or wrong,

[2] Appellant claims that appellee failed to give notice of the entry of the order of the Appellate Division, as, appellant contends, was required by Rule 188 of the New York Rules of Civil Practice. No contention or showing is made, however, that appellant lacked full opportunity to litigate jurisdictional issues.

the decision of the New York courts on the subject of personal jurisdiction over appellant is *res judicata* and binding here. Under such circumstances it is clear the requirement that the petition for removal be filed before trial in the state court was not fulfilled and it was, accordingly, properly denied. *Hanover Nat. Bank* v. *Smith,* C. C., S. D. N. Y., 11 Fed. Cas. No. 6,035; *McCallon* v. *Waterman,* C. C., E. D. Mich., 15 Fed. Cas. No. 8,675; *Neale* v. *Foster,* C. C., D. Ore., 31 Fed. 53, 56; see *City of Detroit* v. *Detroit City Ry. Co.,* C. C., E. D. Mich., 54 Fed. 1, 8.

Affirmed.

Decision.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

THE CITY OF BUFFALO,
Plaintiff-Respondent,
against

PLAINFIELD HOTEL CORPORATION,
Defendant-Appellant,

SPANN REALTY CORPORATION *et al.*,
Defendants.

Before:
AUGUSTUS N. HAND, CHASE AND FRANK,
Circuit Judges.

Petition for rehearing.

JAMES P. KOHLER AND JAMES P. KOHLER, JR., *Attorneys for Plainfield Hotel Corporation, Petitioner.*

Per Curiam: Petition denied.

A. N. H.
H. B. C.
J. N. F.
C. JJ.

Filed Nov. 22, 1949.

MEMORANDUM IN SUPPORT OF THE APPLICATION.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION, a corporation of the State of New Jersey, for a Writ of Certiorari,

Petitioner,

against

The HONORABLE CARLTON A. FISHER and LESLIE F. ROBINSON, County Judges of the County of Erie of the State of New York, and of the Appellate Division, Fourth Department of the State of New York, and the HONORABLE JOHN KNIGHT, Judge of the United States District Court for the Western District of New York, and the other judges and officers of said Court and of the Court of Appeals for the Second Circuit.

Respondents.

POINT I.

The Importance of the Question:

The Appellant by its treasurer, F. Dudley Kohler, has had plans made for suitable apartments for the accommodations of veterans on this property. These plans and the specifications have been made by an architect by name of Albert A. Rumsschik of 263 Linwood Avenue, Buffalo, New York, and these plans have received the approval of the Federal Housing Administration, after several years of work and negotiation. The intention of the City of Buffalo Tax Department is to sell the lots for small frame houses which would accommodate a much smaller number of families and would not have the facilities which the apartments

would provide. Mr. Kohler is especially interested in this project for veterans because he is a veteran himself, and a member of the American Legion, Post 1026, State of New York, and is also an active member of the Veterans Corps of Artillery of New York which is part of the State National Guard. He became a member of the Sons of the Revolution of the State of New York in the year 1913 almost immediately after his graduation from Yale College. He was also a captain in the U. S. O. He refused to accept the veterans' bonus.

The estimated cost of this housing project is $1,130,000.

Appellant will be glad to submit copies of these plans and specifications to this Honorable Court, if so permitted.

POINT II.

Statement of the Case:

A petition for removal of this case from the County Court of Erie County, New York, with bond and affidavit, were all filed in the District Court of the United States for the Western District of New York, on August 16, 1948, with a Notice for an order of removal asked to be returned or settled on August 30th, 1948. An order denying the petition was entered September 14th, 1948 with costs.

The grounds for removal as stated in the petition are prejudice and local influence, diversity of citizenship, a constitutional question, and a separable controversy.

Notice of appeal from said order to the Court of Appeals for the Second Circuit, was filed October 13, 1948 with bond and Notice of Exceptions.

Notice of motion for rehearing was filed October 19, 1948 returnable October 25th, 1948 and opinion by Judge Knight

was filed January 11, 1949 and order denying January 18th, 1949.

Motion for a second rehearing was filed January 20th and returnable January 25, 1949, and order denying filed January 26, 1949.

March 2nd, 1949, Notice of Appeal from order denying rehearings.

The action in the County Court from which removal was sought, was commenced February 24, 1947 by the alleged service of a summons and complaint to foreclose tax liens on unimproved real property adjoining Houghton Park in Buffalo. The alleged service was made on one Frank Illich who made affidavit that he was not an officer nor director of the appellant corporation, and that it had no place of business and was not doing business in the State of New York, and objected to the jurisdiction on said grounds, and asked that said service be set aside, and appeared specially for such relief, on motion returnable March 31, 1947. The facts of this affidavit were not contradicted by the respondent City of Buffalo and they remain undisputed and true. *Said motion was denied* by the County Court *without taking any testimony or examination,* and an order entered May 5th, 1947, thereby showing *prejudice and local influence* against the Appellant, Plainfield Hotel Corporation. An affidavit by one Frank Eisner, the supposed process server, in opposition to said motion was submitted in opposition, but no copy of same was ever served on Appellant's attorneys appearing specially, as required by New York Rules of Civil Practice, Rule 65, although a copy of same was requested on May 14, 1947. There was *no option* on this motion. An appeal was taken May 26, 1947 to the Appellate Division, Fourth Department in Rochester, New York, which *affirmed* the County Court order with costs and with no opinion, which also showed *local influence and prejudice.*

On April 30, 1948, the respondent, City of Buffalo, without notice as required by Rules of Civil Practice, Rules 190, 191 and 192, entered judgment against appellant, and without notice of any reference, hearing, application or entry, all of which are required by said New York Rules of Civil Practice (Fols. 45-48).

That shortly thereafter on May 26, 1948, the Respondent offered said lands for sale at public auction at which time Appellant, appearing specially, made the highest public bid to buy, namely $14,100, but Respondent out-bid Appellant and bought in the land for its own account, showing prejudice against Appellant.

That the record of the County Clerk's Office May 7, 1948, shows that no notice of said proceedings was given (Fol. 48) as required by Rules of New York Civil Practice.

That on May 25, 1948, Appellant obtained an Order to Show Cause (Fol. 63) from said County Court returnable May 27, 1948, why said judgment should not be vacated, but said motion was called for hearing at 2 P. M. *the same day or two days before the return day,* and denied without opinion, and order entered denying, the same day, *showing more prejudice.*

Appellant appealed June 22, 1948 from said order to the said Appellate Division which *dismissed the appeal without opinion* and with costs (Fols. 65-66) showing *prejudice there also.*

The Petition for Removal dated May 14, 1948, was denied by Judge Knight, September 14, 1948, by order (Fol. 101).

The delay in paying taxes was because of bank failures in the depression years, and War restrictions which followed against building materials and F. H. A. restrictions, but previous to this time the taxes had been paid for nearly 100 years.

POINT III.

Constitutional Questions:

The provision for "due process of law" of the Constitution of the United States, has not been respected in this litigation. The City of Buffalo has disregarded the Rules of Civil Practice of the State of New York in failing to give notice of steps taken in this litigation and of orders and judgment which it entered, thereby cutting off the rights of the appellant to due process.

Article XIV of the United States Constitution, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life liberty *or property* without *due process of law,* nor deny any person within its jurisdiction, the *equal protection of the laws.*

POINT IV.

Right of Redemption:

The right of redemption is upheld by the highest Court of the State of New York in People *ex rel.,* Chase vs. Wemple, 144 N. Y. 478 in which it is held: "One who occupies * * * is entitled to notice of an application to redeem from a tax sale. The State comptroller has no authority to cancel an order of redemption under a statute authorizing him to cancel a tax sale." In Levy vs. Newman, 130 N. Y. 11: "The infant owner of land sold for taxes * * * was served with notice of sale and *failed to redeem within the time prescribed by the Act* * * *".

POINT V.

Constitutional Grounds:

The proceedings herein were *defective on Constitutional grounds:*

The *service of process* was not legally made on Appellant; the proceedings thereafter were not in accordance with Rule of Civil Practice and therefore *due process of law* was not performed by Respondent. It is held in Clark vs. Kirkland, 133 App. Div. 826, 118 N. Y. Supp. 315, 202 N. Y. 573: "Assessing land as nonresident, when there is a resident owner or occupant, to whom by Tax Law it should be assessed, is a defect affecting the jurisdiction on constitutional grounds, within sections 131 and 132, making a tax deed after two years conclusive of regularity of all proceedings, except as to *"any defect in the proceedings affecting the jurisdiction on constitutional grounds."*

POINT VI.

Tax Deeds Nonconclusive:

In the case of Adirondack League vs. Keyes, N. Y. Appellate Division, Fourth Department which includes City of Buffalo, it is held: "That section 131 is not limited to unrecorded conveyances and section 132 to recorded conveyances, but that both sections are to be so construed as to render tax deeds nonconclusive evidence in actions or proceedings brought to cancel them within five years *after expiration of the redemption period* • • •"

POINT VII.

The Only Interest Passing Was that Specified in Conveyance:

The Appellant herein, being an assignor of mortgagee, the interest was not conveyed because it had assigned the mortgage to Marion County, Tennessee Co-operative Corporation, by assignment of record, to which no notice or process was given by Respondent, and was not made a party to this foreclosure action, and its name is not mentioned in the tax conveyance. It is held in Sheldon vs. Russell, 91 Misc. N. Y. 278, 154 N. Y. Supp. 632, "Held that the only interest passing was that specified in the conveyance."

POINT VIII.

Notice of Redemption Not Given by County Treasurer as Required:

In Gabel vs. Williams, 39 Misc. N. Y. 489, 80 N. Y. Supp. 489, held to require a compliance with sections of the Tax Law at a sale * * * before the purchaser can dispossess the occupant or a mortgagee in possession. Where *a special act* prescribes *publication of notice to redeem* from *tax sale by the county treasurer,* and the general tax law requires a written notice * * * Laws requiring a purchaser at tax sale to give notice of redemption, though in words applying only to a sale made by the state comptroller, apply also to a sale by a county treasurer for state and county taxes.

POINT IX.

The Action to Foreclose Ought to Have Been Dismissed:

In *People* vs. *Adirondack Power & Light,* 134 Misc. 329, 235 N. Y. Supp. 271, it is held, that action by state, to recover possession of land claimed under a conveyance executed pursuant to tax sale *dismissed because of defective proceedings leading up to sale.*

A letter from the County Clerk, dated May 7, 1948, reads:

> "In the action of City of Buffalo vs. Spann Realty Corp., the register shows the following: October 22, 1946 summons & Comp.
> March 31, 1947 Affidavit of Service.
> May 12, 1947 Notice of Motion.
> May 29, 1947 Notice of Appeal.
> April 30, 1948 Judgment Roll.
>
> Very truly yours,
>
> Harry C. Vackel, County Clerk, by Thomas V. Lyons, Deputy Co. Clerk."

It follows from the above record, that the time to answer had not commenced to run *when the petition for removal was filed and served because the order of the Appellate Division on the validity of the service had not been served.*

POINT X.

The City Charter of the City of Buffalo is unconstitutional in so far as it provides for the sale of real property for taxes without the right of redemption and without due process of law, and contrary to State Tax Law Sec. 162.

POINT XI.

It was unlawful for the City of Buffalo to advertise the land for sale at public auction and then buy it in regardless of the highest bid from one of the public. When the best bid from the public is not satisfactory, the sale must be adjourned.

POINT XII.

The Special Appearance Was Proper:

It is held in Bernstein vs. Hakim, 126 Misc. 582, 214 N. Y. Supp. 82, "Motion to vacate a service of summons and complaint on the ground of plaintiff's fraud in obtaining service, is not a general but a special appearance."

In Banco vs. Escober, 135 Misc. 165, 237 N. Y. Supp. 267, "Service of notice of appearance by attorney for a non-resident defendant was construed as merely for the purpose of asserting the lack of jurisdiction, and was not a general appearance."

POINT XIII.

Appellant Not in Default:

The holding in City of Detroit vs. Detroit City Ry., 54 Fd. 1, does not apply to this case because defendant-appellant was not in default BECAUSE ITS TIME TO ANSWER HAD NOT COMMENCED TO RUN, because no notice of entry of the order had been given. Also that the time was waived by plaintiff-respondent in failing to give notices required by state law as held in Marking vs. New St. Lewis, 48 Fd. Supp. 680.

POINT XIV.

Appellant is Proper Party:

An assignment of mortgage permits the assignee to sue in name of the assignor as held in Fox vs. Peacock, 153 App. Div. 887, 138 N. Y. Supp. 535, "under N. Y. Code of Civ. Pro. Sec. 756 providing that in case of a transfer of interest, the action may be continued by or against the original party, unless the Court directs transferee to be substituted, an action may be continued on appeal against the original defendants though they assigned their interest in the subject matter and a motion to substitute the assignee as respondents, be denied."

POINT XV.

The County Court Never Acquired Jurisdiction of Appellant:

The case of *Conly vs. Mathieson,* 190 U. S. 406 "granting the existence of a cause of action, it is not every service *on an officer of a corporation* which will give a State Court jurisdiction of a foreign corporation. The residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. *He must be there officially representing the corporation in its business.* Service in New York of a summons on a director of a foreign corporation, who resides in New York is not sufficient to bring the corporation into Court where at the time of service the corporation *was not doing business in New York.*" Also Fitzgerald v. Fitzgerald, 137 U. S. 98; St. Clair vs. Cox, 106 U. S. 350.

POINT XVI.

The Judgment Was Not Entered as Required by Rules of Civil Practice, and Therefore Void:

The *judgment of foreclosure and sale* in this action was *entered without notice to Appellant,* as required by Rules of Civil Practice 188 and 190. The *alleged default* can be opened *after judgment and sale,* where no notice is given, see Powell vs. Home Seeker Realty Co., 131 Misc. 590, 228 N. Y. Supp. 131, Selinger vs. G. C. Inc., 81 Misc. 343, 142 N. Y. Supp. 194.

POINT XVII.

Appellant's Defenses to Foreclosure of Property:

The defenses to the complaint are that *Appellant appears specially to object to the jurisdiction* on the ground of *non-residence;* and *not doing business* in this State; that *Appellant tenders payment* of the amount claimed in full; that there is a *Constitutional question* involved in that it is being *deprived of its property without due process* of law, in *not having its day in Court* and judgment entered *without notice* of application or of entry, as required by Rules of Civil Practice 188 and 190; that it has a right *to redeem said property* as provided in Section 162, Tax Law of State of New York, and Charter of City of Buffalo which requires notice, Secs. 611 to 619 and 651, Art. 31.

POINT XVIII.

Appellant's Rights:

"The owner of mortgaged realty could appear in an action *to foreclose at any time* and such appearance entitled

her to notice of all subsequent proceedings." Irving Trust vs. Seltzer, 40 N. Y. Supp. 2nd, 451, 265 App. Div. 896, City of Buffalo vs. Kissinger, 40 N. Y. Supp. 2nd 188.

"A defendant in a foreclosure action can appear after default."

Emigrant Sav. Bank vs. Van Bokkelen, 269 N. Y. 110.

"A defendant who entered a special appearance is not deprived of his right to object to the jurisdiction by delaying until after rendition of a judgment for want of appearance." Powell vs. Home Seeker R. Co., 131 Misc. 590, 228 N. Y. Supp. 131.

POINT XIX.

Notice of Application for Judgment is Necessary:

No notice of application for judgment was given as required by Rule 190 Rules of Civil Practice. Selinger vs. G. C. Inc., 81 Misc. 343, 142 N. Y. Supp. 194, Mahnk vs. Blanchard, 233 App. Div. 585, 253 N. Y. Supp. 307; Also required by Rule 188; *Re:* Levy, 54 How. 129.

POINT XX.

Right to Challenge Service in State Court Not Waived:

"A defendant by removal to the Federal Court, does not lose the right to challenge the *invalidity of the service in the State Court.* Whether service on a foreign corporation was valid under New York decisions depended on whether a corporation was 'present' in the state by virtue of those activities which it there set in motion, Homze vs. Nardis, 165 Fd. Rep. 2nd 33.

"If it appears on the record that the case is removable and the statute has been complied with USC 28:72 it is the *duty of the State Court to proceed no further,* it may not try the allegations of the removal petition, Kern vs. Huidekoper, 103 U. S. 148, Ches. & O. R. R. vs. Cockrell, 232 U. S. 146.

"After the defendant has filed in the State Court the *removal petition* as described above with a *proper bond* the Federal Court acquires and the state court loses jurisdiction of the case, William vs. N. Y. & R. Co., 11 Fd. 2nd 363, Morgan vs. Kroger Grocery, 96 Fd. 2nd 470.

"*It is not necessary* that the state *court grant an order of removal* B. & O. R. R. vs. Koontz, 104 U. S. 5."

POINT XXI.

Conclusion:

The want of jurisdiction of the County Court over Appellant, the lack of legal service of process, the failure to give notice of application for reference and judgment, the lack of due process of law, the evidence of prejudice and local influence against the non-resident Appellant, the violation of Constitutional rights, the right of redemption, it is respectfully submitted that a writ as prayed for by the petitioner should be issued as the only means to protect the rights of this petitioner to which under the Constitution and laws it is entitled.

Dated: February 14, 1950.

Respectfully submitted,

JAMES P. KOHLER & JAMES P. KOHLER, JR.,
Attorneys for Petitioner.

FILE COPY

Office - Supreme Court, U.
FILED
APR 14 1950
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

No. 616.

FEBRUARY TERM, 1950.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION for a Writ of Certiorari,
Petitioner,
against
THE CITY OF BUFFALO,
Respondent.

REPLY BRIEF OF PETITIONER, PLAINFIELD HOTEL CORPORATION.

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Counsel for Petitioner,
No. 109 Broad Street,
New York City 4, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

No. 616.

FEBRUARY TERM, 1950.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION for a Writ of Certiorari,
Petitioner,
against
THE CITY OF BUFFALO,
Respondent.

REPLY BRIEF OF PETITIONER, PLAINFIELD HOTEL CORPORATION.

Statement.

The brief of the Respondent reads more like an affidavit, as many statements are made which are contrary to the facts.

It is not true that the petitioner did not offer a proposed answer on the motion to open the alleged default. The proposed answer contained a defense of a tender to pay

all taxes with interest and penalties, but as the County Judge denied the motion from the bench before this could be explained, the answer was not handed up and made part of the record. This is one of the indications of prejudice on the part of the County Court.

Just after the Order to Show Cause was granted and served on Respondent in the forenoon, May 25, 1948, the attorney for the Respondent met Mr. Kohler in the Court House and said that the County Judge *had ordered* the argument for 2 P. M. of that same day, instead of on May 27th, the return day, or two days later, thereby giving no time to prepare for the argument to which there was no consent.

At the time of argument of this motion, Petitioner was given no consideration, and the motion was denied, although the Court was told that the alleged default judgment was entered without the notice required by New York Rules of Civil Practice Nos. 188 and 190, *and thereby without due process of law*, and in violation of Petitioner's Constitutional rights.

In the Respondent's brief, the word, "duly" is used throughout, when in fact there was no "due" practice on its part, as the Respondent proceeded without regard for the Rules of Practice, as shown in the following steps:

The Petitioner owned a purchase money mortgage on the property in question, from the Spann Realty Corporation, which had defaulted on taxes and interest and was actually dissolved December 16, 1946 by the proclamation of the State and before this action was commenced. Evidence of this proclamation is annexed to this brief, pp. 1 and 2, entitled "Additional Papers" and made a supplement hereto.

In the argument of this case in the U. S. Court of Appeals for the Second Circuit, the attorney for the Respondent made a stipulation in writing that the Spann Realty Corporation had been dissolved before this suit was brought, which stipulation is as follows:

"IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties hereto, that the defendant Spann Realty Corporation was dissolved by proclamation of the Secretary of the State of New York, published December 16, 1946.

Dated, October 14, 1949.

ADON W. CROSBY,
Attorney for Appellees.

JAMES P. KOHLER,
Attorney for Appellants."

Counsel for the Respondent, *surprisingly*, has failed to admit in his brief that such a stipulation was made, and he proceeds to argue that the Spann Realty Corporation is a party to this suit.

The fact that Spann Realty Corporation became non-existent before this suit was brought on the 24th day of February 1947, has the effect of its title to the property in question, being returned to the Petitioner, Plainfield Hotel Corporation, as the purchase money mortgagee, and although the Petitioner had brought a suit of foreclosure against the Spann Realty Corporation on February 28, 1944 for non-payment of taxes and interest, the dissolution of the Spann Realty Corporation, made that foreclosure suit superfluous. However, a copy of the foreclosure proceedings is included in the "Additional Papers" annexed hereto.

By reason of the foregoing, it is clear that Petitioner is a party in interest, as title holder besides its interest in the mortgage at the time this suit was commenced.

As to the Petitioner's rights as mortgagee, it is well established, that the assignee of a chose in action, may proceed in the name of the assignor, see Fox vs. Peacock, 153 App. Div. 887, 138 N. Y. Supp. 535, and under N. Y. Civil Practice Act Sec. 83, providing that in case of a transfer of interest, the action may be continued by or against the original party.

Because the Spann Realty Corporation had been dissolved, it was not a necessary party to this action, and hence it was not properly joined as a party in interest as a defendant citizen of the State in which this action was brought.

The other defendants were merely lienors and not necessary parties to the foreclosure of the tax liens.

The defendant, Spann Realty Corporation, having been dissolved, and the other defendants being not necessary parties either, there was no other necessary party defendant than your petitioner, see Grover vs. Florence, 18 Wall. 553.

In determining diversity of citizenship, the party who is an indispensable party to the litigation, must be a non-resident, Rule 19, 28 USCA (1948) which is the case at bar, petitioner being a New Jersey corporation.

The petitioner's motion to vacate the service of the summons was denied in the County Court, without any proof that the service had been made on an officer of Plainfield Hotel Corporation, and against proof that the one served was not an officer and had never been an officer or in any way connected therewith. No opinion was rendered by the County Court, nor by the Appellate Division sustaining it.

The petitioner did not file a general appearance because it was never served with the summons, but it did appear specially to object thereto. The procedure for proper legal service was not followed by Respondent, and judgment was entered on this illegal service without notice of application for judgment, and without an opportunity to serve an answer, and against Rules of Civil Practice.

The action was referred by the County Court to a Referee without any notice of reference, or of a hearing as required by Rules of Civil Practice 190, sub. 2. This was also a violation of "due process." So the hearing before the Referee was not "duly held" as Respondent claims. The Referee's report was never served on Petitioner, and on said report the Clerk entered judgment, without notice of application, or notice of entry, and not "in accordance with the practice of said Court," and was not "duly entered" in the Erie County Clerk's Office on the 30th day of April, 1948. Powell vs. Home Seeker Realty Corp., 131 Misc. 590, 228 N. Y. Supp. 131.

By these improper steps, the Petitioner's rights to "due Process" were violated and prejudiced.

Petitioner knew from a letter from the County Clerk May 7, 1948 that a judgment had been entered on April 30, 1948, but no notice of a sale was given. Petitioner learned of a sale only because of being in Buffalo on another case. Petitioner participated in the bidding, and made the highest public bid of $14,100 which was estimated to cover the tax bills, but Respondent made a higher bid of $15,000 to buy it in, and thereby obtained no revenue from the sale, but the vacant land, and prevented thus far the large veterans housing project which petitioner had planned thereon with financing arranged. This certainly shows prejudice against Petitioner.

The said Order to Show Cause to vacate the judgment was not in violation of Rule 260 Civil Practice Act, which reads as follows: "Notice of application for stay of sale. No order to stay a sale under judgment for the foreclosure of *a mortgage* shall be made by a judge out of court, except on a notice of at least twenty-four hours to the plaintiff's attorney."

It is respectfully submitted that the said Order to Show Cause was on twenty-four hours notice, because it was made on May 25th, 1948 and returnable May 27th, and was served in the forenoon of May 25th and vacated and denied at 2 P. M. of the 25th of May.

The right to redeem land sold for taxes is set forth in New York State Tax Law.

There was no default in pleading as Respondent claims, because the Respondent failed to give notice of the entry of an order denying the motion to set aside the service of the summons, as required by Rule 190, see Mahnk v. Blanchard, 233 App. Div. 555, 253 N. Y. Supp. 307, "In order of reference to ascertain the amount due on a mortgage being foreclosed, court erred in inserting provision for judgment and sale without notice to tenant who had appeared." Beach 70th Street Holding Corp. v. Beachland, 161 Misc. 445, 291 N. Y. Supp. 262, "The defendant in a foreclosure action, against whom judgment may be taken on application to the court, and who has appeared generally but has made default in pleading, is entitled to at least five days notice of the time and place of the application for judgment."

The judgment herein was entered contrary to Rules of Civil Practice, Nos. 188, 190, 191 and 192.

Constitutional Questions (Fol. 34) of Petition.

It is respectfully submitted that the foregoing breaches of rules of practice are not only evidence of prejudice against this petitioner but also violated its right to due process of law as provided in the Fourteenth Amendment of the Constitution of the United States.

A Constitutional question is envolved as to the right of Petitioner to redeem its real property within one year after tax sale as provided in the New York State Tax Law:

Redemption of Land From Tax Sales.

"Section 134: Notice to occupants:
The incumbrance of a US Deposit Fund *mortgage* is not cut off by a tax sale and the subsequent conveyance of the property to the County or to an individual, Op. Atty. Gen. 1944—153.

In the case of *Sheldone vs. Russell,* 154 N. Y. Supp. 632, 91 Misc. 278, it is held: 'The certificate of the County Treasurer, *reciting that due notice of the tax sale was served upon the occupant* and certifying *that the lands remained unredeemed,* being recorded with the deed, was a compliance with Tax Law Sc. 134, requiring such notice to be recorded with the conveyance.' Tax Law, Art. 6, Sc. 131, which deals with sales by the comptroller, provides that after one year from the sale the comptroller shall, after application in writing therefor, execute to the owner of the tax certificate, a conveyance of the lands sold for taxes and *not redeemed.*"

In the case of People *ex rel.* Russell vs. Doty, 234 N. Y. 559, 138 N. E. 446, "Facts showed an appeal by permission, from an order of the *Appellate Division* of the Supreme Court in the *Fourth Judicial Department* which CON-

FIRMED A DETERMINATION of county treasurer permitting the *redemption* of certain real property, which had been sold for taxes. A commissioner appointed under section 137, reported that in view of the fact that no notice was served as prescribed in section 134 of the Tax Law, that the title owner of the lands was entitled to redeem the same, by paying the amounts necessary for such purposes as provided in section 137 of the Tax Law."

The Tax Law of the State of New York, being Chapter 60 of the Consolidated Laws, *Article 6, Section 127, "REDEMPTION OF LANDS."* "The owner or occupant of any lands sold by the department of taxation and finance for taxes, or any other person having an interest therein at the time of the sale, may redeem the same from such sale at any time within one year after the last day of the sale * * *."

Section 130, "Notice of unredeemed lands. The department of taxation and finance shall, at least three months before the expiration of the one year allowed for the redemption of lands, sold by it for taxes, cause a notice to be published once in each week for at least six weeks successively, the last publication to be at least six weeks before expiration of the year, in the newspapers * * * specifying particularly every parcel unredeemed, and the amount necessary to redeem same."

Section 139: Redemption by mortgagee. "The holder of any mortgage which is duly recorded at the time of the sale, may at any time after the sale of all or any part of the mortgaged premises for unpaid taxes or assessments, and before the expiration of six months after the time of filing of the evidence of the giving of the notice required by the preceding section, or if evidence of the giving of

such notice be not filed, then at any time within 36 months after the sale, and not thereafter, *redeem the premises* so sold, or any part thereof from such sale."

The petition for removal is not too late.

There was no default on the part of the Petitioner because no copy of the decision, and order with notice of entry, of the Appellate Division had been served before entry of judgment, as the record plainly shows. There was no notice of application for a Referee and no notice of hearing, or of the report of the Referee. These facts show that there was no default under the State practice. However, since the County Judge, on the insistence of the Corporation Counsel, held that there was a default, the Petitioner moved to vacate it, and for leave to answer the complaint. This motion was also denied *without opinion,* which is claimed to be an abuse of discretion. The land was then sold without notice to Petitioner, but it learned of same by being in the City of Buffalo on another matter.

Petitioner then filed its petition and bond in the United States District Court for removal on the grounds of diversity, and Constitutional questions because of lack of "due process of law", and prejudice and local influence, which was denied.

But the time for the petitioner to answer or plead in the action had not then expired, because no service of the order of the Appellate Division with Notice of Entry had been made on Petitioner as required by New York Civil Practice Act, so that the time to appeal from that order would not commence to run until such notice of entry were given, Rule 230 Rules of Civil Practice.

In the case at bar the time to answer had not commenced to run because the decision and order of the Appellate Divi-

sion regarding the service, had never been served with notice of entry, as required by Rule 230, R. C. P.

The petition, therefore, was not filed "too late," as the suit had not been tried in the State Court by reference to a referee in compliance with the State law because it was done without notice as required by Rules 188, 189 and 190. The decision had not become final and was subject to be vacated, as held in Powell vs. Home Seeker Realty, *supra.*

In the County Court, no hearing on the merits were allowed, and petitioner was denied its day in Court although it asked for same, which constituted lack of "due process of law".

In the case at bar, the State Court proceedings did not comply with the rules of practice, so that the judgment was subject to being vacated, and the removal petition therefore was filed before a "trial" in the state court, because the state court granted judgment without notice required, without hearing, without notice of application for judgment, or entry of judgment, after a Notice of Appearance, making the "trial" a nullity. The *notice of entry* of the order of the Appellate Division was never given as required by Rules of Civil Practice, and the time does not commence to run until such notice is served.

In the case of Detroit vs. Detroit City Ry., 54 Fd. 1, it is held: "If it was not legally, then it was not in Court and there could have been no trial of its case until after it had filed its answer." "There could have been no trial on the order *pro confesso because that order was void.* The order could *only be valid in case all the steps required by the statute of Michigan* in summoning an absent defendant had been literally and exactly complied with." *"If it was not legally served, then it was not in Court,* and there could

HAVE BEEN NO TRIAL of its case until after it had filed its answer." "The words, 'any time before trial' should be given their ordinary meaning, *i. e.* 'at any time before the first trial thereof and up to the time of that first trial whether that occur at one term or another, *the right of removal under the local prejudice clause remains.*' "

In determining diversity of citizenship, the party who is an indispensable party to the litigation, must be a non-resident, Rule 19, 28 USCA (1948).

SUITS IN EQUITY AND AT LAW ARE BOTH REMOVABLE: Detroit City Ry. vs. Detroit, 54 Fd. 1.

Detroit Ry. vs. Detroit, 54 Fd. 11 "a petition may be filed at any time before trial even though many terms and many years have passed."

Fourteenth Amendment of the Constitution of United States.

Section 1 Paragraph 1292; "A Judgment *in Personam* directing execution to issue and thereby purporting to cut off all available defenses, may not be rendered, irrespective of the descendant's domicile or whereabouts without some form of notice by personal or substituted service, which is essential even for a Judgment *in rem* so far as property within the jurisdiction is concerned." See:

Griffin vs. Griffin, 66 S. Ct. 556, 327 U. S. 220, 90 L. Ed. 635 *re* hearing denied 66 S. Ct. 975, 328, U. S. 876, 90 L. Ed. 1645.

"Due process" forbids any exercise of judicial power substantially affecting a ~~descendant's~~ defendant's rights without notice.

Determination of rights without reasonable opportunity for hearing and without valid service would violate the basic constitutional right, Kean vs. Bailey, 82 Fd. Sup. 260.

The Petition for a Writ of Certiorari ought to be granted, mainly because the petitioner is being deprived of its property without due process of law and in violation of its Constitutional rights to redeem its property as provided by the laws of New York State, which rights have been overlooked by the lower Courts, and disregarded, to Petitioner's great loss.

April 13th, 1950.

Respectfully submitted,

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Attorneys for Petitioner.

FILE COPY

No. 616

FILED

APR 14 1950

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme

United States Court ~~of Appeals~~

~~FOR THE SECOND CIRCUIT.~~

Miscellaneous Civil.

THE CITY OF BUFFALO,
Plaintiff-Respondent,

vs.

PLAINFIELD HOTEL CORPORATION,
Defendant-Appellant,

SPANN REALTY CORPORATION, E. W. WALTER, as nominee of CENTRAL HANOVER BANK and TRUST COMPANY, THOMAS J. ATCHESON, doing business under the assumed name and style of T. J. ATCHESON GLASS CO., STATE TAX COMMISSION, THE PEOPLE OF THE STATE OF NEW YORK, BUFFALO SEWER AUTHORITY, COUNTY OF ERIE,
Defendants.

ADDITIONAL PAPERS PRINTED BY APPELLANT,

Petitioner

FRED C. MALONEY,
Attorney for Plaintiff-Respondent,
Office and Post Office Address,
65 Niagara Square,
Buffalo 2, New York.

JAMES P. KOHLER & JAMES P. KOHLER, JR.,
Attorneys for Defendant-Appellant,
Plainfield Hotel Corporation, Appearing Specially,
Office and Post Office Address,
109 Broad Street,
New York City 4, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

Supplement to Petitioner's Reply Brief in United State Supreme Court

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE CITY OF BUFFALO,
Plaintiff-Respondent,
vs.
PLAINFIELD HOTEL CORPORATION,
Defendant-Appellant,
SPANN REALTY CORPORATION, *et al.*,
Defendants.

Letter from Department of State.

THOMAS J. CURRAN
SECRETARY OF STATE

STATE OF NEW YORK
DEPARTMENT OF STATE
DIVISION OF CORPORATIONS
ALBANY 1

FC September 27, 1949.

Mr. J. P. Kohler,
109 Broad St.,
New York City.

Dear Sir:

This office is in receipt of your favor of the 24th inst. Certificate of incorporation of Spann Realty Corporation was filed March 7, 1940, location Buffalo, Erie County.

The above corporation was dissolved by proclamation of the Secretary of State, published December 16, 1946.

Yours truly,

EDWARD F. GOETZ,
Head Clerk.

Referee's Report, with Oath.

STATE OF NEW YORK.

SUPREME COURT—COUNTY OF ERIE.

PLAINFIELD HOTEL CORPORATION,
Plaintiff,
against
SPANN REALTY CORPORATION, GEORGE HANDRULIS, *et al.*,
Defendants.
} Oath.

State of New York,
County of Erie,
City of Buffalo.
} ss.:

I, HARRY J. KELLY, the Referee appointed by an order of this Court, made and entered in the above entitled action, and bearing date the 28th day of February, 1944, to ascertain and compute the amount due the *plaintiff* upon the bond and mortgage upon which this action was brought,

do solemnly swear that I will faithfully and fairly determine the question so referred to me, and make a just and true report thereon according to the best of my understanding.

HARRY J. KELLY.

Sworn to before me, this
25th day of March, 1946.
Catherine L. Barone,
Notary Public,
Erie County, N. Y.

§§ 1016, 721, Sub. 11.

STATE OF NEW YORK.

SUPREME COURT—COUNTY OF ERIE.

PLAINFIELD HOTEL CORPORATION,
Plaintiff,

against

SPANN REALTY CORPORATION,
GEORGE HANDRULIS, *et al.*,
Defendants.

} Report.

To the Supreme Court:

In pursuance of an order of this Court, made and entered in the above entitled action, and dated the 28th day of February, 1945, whereby it was referred to the undersigned, as Referee, to ascertain and compute the amount

due to the *plaintiff*, upon and by virtue of 2 bonds and mortgages upon which this action was brought, and also to examine and report whether in his opinion the mortgaged premises can be sold in parcels.

I, HARRY J. KELLY, the Referee in the said order named, DO REPORT, That before proceeding to hear the testimony I was first duly sworn faithfully and fairly to determine the question referred to me, and to make a just and true report thereon, according to the best of my understanding; that I have computed and ascertained the amount due to the *plaintiff* upon and by virtue of said bond and mortgage, and that I find and accordingly report that there is due to the *plaintiff* for principal and interest on the said bond and mortgage, at the date of this my report, the sum of

Dollars ($).

Schedule A, hereunto annexed, contains a schedule of the documentary evidence introduced before me, and shows the amounts due for principal and interest respectfully, the period of the computation of the interest, and its rate.

Dated at Buffalo, N. Y., this 25th day of March, 1946.

HARRY J. KELLY,
Referee.

Statement of Fred Dudley Kohler.

SUPREME COURT—COUNTY OF ERIE.

PLAINFIELD HOTEL CORPORATION,
Plaintiff,

vs.

SPANN REALTY CORPORATION,
GEORGE HANDRULIS, *et al.*,
Defendants.

Proceedings had and evidence taken before Harry J. Kelly, Referee duly appointed in the above entitled action, by an order of this Court granted and entered therein on February 28, 1944 at a hearing held on March 25, 1946.

State of New York,
County of Erie,
City of Buffalo. } ss.:

FRED DUDLEY KOHLER, sworn as a witness, testified as follows:

I am the Treasurer of Plainfield Hotel Corporation, a corporation organized and existing under the Laws of the State of New Jersey, which is the holder of the bonds and mortgages herein sought to be foreclosed.

On the 20th day of September, 1937, the defendant, George Handrulis, made and delivered to Dr. Charles G. Miller and the plaintiff herein his bond and mortgage for Forty-two Hundred ($4200.00) Dollars with five per cent (5%) interest, said mortgage to be paid in full on the 20th day of September, 1938. (The original bond and mort-

gage offered in evidence and marked Plaintiff's Exhibits "A" and "B".)

Thereafter and on or about the 11th day of August, 1943 the Executor of the Last Will and Testament of Charles G. Miller duly assigned to the plaintiff herein all his interest in and to said bond and mortgage by an instrument under seal. (The original assignment offered in evidence and marked Plaintiff's Exhibit "C".)

The defendant nor any of his successors in interest have made any payments on account of said bond and mortgage and there is now due and owing to the plaintiff the sum of Forty-two Hundred ($4200.00) Dollars, together with interest at five per cent (5%) thereon from September 20, 1937.

The deponent further shows that Spann Realty Corporation, one of the defendants herein, on or about the 7th day of August, 1940 duly executed its bond and mortgage to secure the sum of Eleven Thousand Three Hundred ($11,300.00) Dollars to Charles G. Miller of Southport, Connecticut and the Plainfield Hotel Corporation, said bond to become due two years from the date of the bond and mortgage with interest at four per cent (4%) per annum. (Bond and mortgage offered in evidence and marked Plaintiff's Exhibits "D" and "E", respectively.)

That on or about the 11th day of August, 1943 the executor of the Last Will and Testament of Charles G. Miller by an instrument in writing duly assigned all his right, title and interest in said bond and mortgage to the plaintiff herein. (Original assignment offered in evidence and marked Plaintiff's Exhibit "F".) No payments have been made

on account of principal and interest and there is now due and owing from the defendants the sum of Eleven Thousand Three Hundred ($11,300.00) Dollars, together with interest thereon at the rate of four per cent (4%) from the 7th day of August, 1940.

The following is a description of the mortgaged premises described in first cause of action:

"ALL that lot or parcel of land, with the buildings and improvements thereon in the City of Buffalo, County of Erie, State of New York, bounded as follows: Cassimir Street on the north, Spann Street on the East and Houghton Park on the west consisting of fourteen (14) lots facing the said park according to plans for improvements and a survey dated February, 1911, made by Edward B. Guthrie, Civil Engineer, and such documents of record in the possession of the seller which the seller agrees to furnish to the purchaser, being part of the property known as the 'Miller Estate' and being lots Nos. 1 to 14 inclusive in Block 'F', on said map."

The following is a description of the mortgaged premises described in second cause of action:

"ALL that tract or parcel of land situate in the City of Buffalo, County of Erie and State of New York, and being a part of Lot No. 8, Township 10 and Range 7 of the Buffalo Creek Indian Reservation so called, and being known and described as subdivision lots Nos. 1 to 14 inclusive in Block B and Nos. 1 to 14 inclusive, and 16 to 28 both inclusive in Block D as shown on a map filed in the Erie County Clerk's office under cover No. 855 together with all the unsubdivided lands shown on said map bounded as follows, to wit:

Northerly by the south lines of said subdivision lots Nos. 14 in Block B, 14 and 28 in Block D and 14 in Block F as shown on said map and said lines extended, about 499.04 feet, easterly by the easterly line of said subdivision lots Nos. 1 to 14 in Block B, extended southerly in a straight line to the Buffalo River about 272 feet, westerly by the westerly line of the aforesaid Lot No. 8 Township 10 Range 7, about 650 feet, southerly by a line about 68 feet long extending from the southerly end of the westerly line hereof easterly to said Buffalo River as shown on said map and southeasterly by the northwesterly line of said Buffalo River, excepting and reserving therefrom so much thereof as is included within the bounds of Spann Street and Fedro Street as now laid out as public streets, and to the extent that the same may be so laid out and to the extent that the same may be so laid out, and excepting also so much thereof as may have been eroded by the waters of the Buffalo River, and that any lands which may have accrued to the premises above described by said waters, are hereby conveyed".

The deponent further says that the premises can be sold in parcels.

FREDERIC DUDLEY KOHLER.

Subscribed and sworn to before me
this 25th day of March, 1946.
Harry J. Kelly, Referee.

SCHEDULE A.

One bond bearing date the 20th day of September, 1937, made and executed by George Handrulis of 311–85th Street Brooklyn, New York to Doctor Charles G. Miller of Southport, Connecticut and Plainfield Hotel Corporation of New Jersey, to secure the payment of Forty-two Hundred ($4200.00) Dollars on the 20th day of March, 1938, with interest at the rate of five per cent (5%) per annum. Marked Exhibit "A".

One mortgage of even date with said bond, made and executed by George Handrulis of 311–85th Street, Brooklyn, New York to Doctor Charles G. Miller of Southport, Connecticut and Plainfield Hotel Corporation of New Jersey as collateral security for the payment of the amount mentioned in the condition of the said bond, acknowledged the 20th day of September, 1937 and recorded in the office of the Clerk of the County of Erie in Liber 3315 of Mortgages at page 465 on October 9, 1943. Marked Exhibit "B".

Assignment made and executed by Union and New Haven Trust Company as Executor of the Last Will and Testament of Charles G. Miller to the Plainfield Hotel Corporation, executed the 11th day of August, 1943 and recorded in the office of the Clerk of the County of Erie in Liber 3315 of Mortgages at page 465 on October 9, 1943. Marked Exhibit "C".

One bond bearing date the 7th day of August, 1940, made and executed by Spann Realty Corporation to Charles G. Miller of Southport, Connecticut and Plainfield Hotel Corporation, to secure the payment of Eleven Thousand

Three Hundred Dollars ($11,300.00) on the 7th day of August, 1942 with interest at the rate of four per cent (4%) per annum. Marked Exhibit "D".

One mortgage of even date made and executed by Spann Realty Corporation to Charles G. Miller of Southport, Connecticut and Plainfield Hotel Corporation, as collateral security for the payment of the amount mentioned in the condition of the said bond, acknowledged the 7th day of August, 1940, and recorded in the office of the Clerk of the County of Erie in Liber 2991 of mortgages at page 394 on the 7th day of August, 1940. Marked Exhibit "E".

Assignment of all right, title and interest in foregoing bond and mortgage executed by Union and New Haven Trust Company as Executor of the Last Will and Testament of Charles G. Miller to the Plainfield Hotel Corporation dated August 11, 1943 and recorded in the office of the Clerk of the County of Erie in Liber 3315 of Mortgages at page 468 on the 9th day of October, 1943. Marked Exhibit "F".

STATEMENT

First Cause of Action

Principal of bond and mortgage unpaid — $4200.00.

Interest thereon from September 20, 1937 to March 25, 1946, eight (8) years, six (6) months and five (5) days, at the rate of five per cent (5%) per annum — $1806.00.

Amount due plaintiff this 25th day of March, 1946 — $6006.00.

Clerk's Certificate.

Second Cause of Action

Principal of bond and mortgage unpaid — $11,300.00.

Interest thereon from August 7, 1940 to March 25, 1946, five (5) years, seven (7) months and eighteen (18) days, at the rate of four per cent (4%) per annum — $2542.50.

Amount due plaintiff this 25th day of March, 1946, — $13,842.50.

GRAND TOTAL .....$19,848.50.

Dated: March 25, 1946.

HARRY J. KELLY,
Referee.

Clerk's Certificate.

I, MAY C. SICKMON, Clerk of the District Court of the United States for the Western District of New York do hereby certify that the foregoing are correct copies of the following papers: Letter from Department of State, Referee's Report with Oath, Statement of Fred Dudley Kohler with Schedule A attached.

IN TESTIMONY WHEREOF I have caused the seal of said Court to be hereunto affixed at the City of Buffalo in the Western District of New York this 14 day of October, Nineteen Hundred and Forty-nine.

Mary C. Sickmon
Clerk

(SEAL)

By Edna E. Briggs
Deputy Clerk

FILE COPY

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 616

FEBRUARY TERM, 1950

In the Matter of the Application
of
THE PLAINFIELD HOTEL CORPORATION
for a Writ of Certiorari,

Petitioner,

against

THE CITY OF BUFFALO,

Respondent.

BRIEF OF RESPONDENT—CITY OF BUFFALO.

FRED C. MALONEY,
Attorney for Respondent,
Office and P. O. Address,
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#65 Niagara Square,
Buffalo 2, New York.

Herbert A. Hickman

BATAVIA TIMES, LAW PRINTERS.
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

No. .....

FEBRUARY TERM, 1950

In the Matter of the Application
of
THE PLAINFIELD HOTEL CORPORATION
for a Writ of Certiorari,

Petitioner,

against

THE CITY OF BUFFALO,

Respondent.

BRIEF OF RESPONDENT—CITY OF BUFFALO.

Statement.

This is an application, on behalf of the Plainfield Hotel Corporation, to review on Writ of Certiorari, a decision of the United States Court of Appeals, Second Circuit, which affirmed an order of the United States District Court for the Western District of New York, (granted September 14, 1948, Honorable John Knight, Presiding Judge,) which

order denied a motion of said Plainfield Hotel Corporation to remove an action from the County Court, Erie County to the said United States District Court for the Western District of New York.

The petitioner sought to remove the suit, hereinafter described, upon the ground

> "* * * that on account of prejudice and local influence in favor of plaintiff and adverse to your petitioner, petitioner will be unable to obtain justice in said County Court of the State of New York, or in any Court of said State to which by the laws thereof, your petitioner may have recourse. That said prejudice or local influence arises from the following facts. That plaintiff is represented by persons of local political influence, and the persons comprising the said Court and its constituents are prejudiced against petitioner because it is a corporation of another state, and local people desire to buy in the property sought to be foreclosed at a very low price on a so-called tax sale."

This petition to remove was verified August 2, 1948. It was filed in the District Court, August 16, 1948. While the motion to remove was not passed on by the District Court until after September 1, 1948, the day when *new* Title 28 took effect, the Courts below were warranted in holding that the *old* law, (Title 28, Sec. 71, Judicial Code) and not the *new*. (Sec. 1441 *et seq.* of the *new* Title 28 U. S. Code), was applicable to the decision of petitioners motion to remove.

Petitioner moved for a rehearing on October 25, 1948, said motion being based upon the affidavits of F. Dudley Kohler, one verified October 13, 1948, and one verified November 20, 1948. The City of Buffalo opposed this motion, reading the affidavit of Adon W. Crosby, Assistant Corporation Counsel, verified January 5, 1949. The Dis-

trict Court, by its order dated January 18, 1949, denied this motion for a rehearing. Petitioner moved, a second time, for a rehearing on January 25, 1949, basing its motion upon an affidavit of F. Dudley Kohler, verified, January 15, 1949. The City of Buffalo opposed this motion, reading the affidavit of Adon W. Crosby, verified January 21, 1949. The District Court, by its order dated January 25, 1949, again, denied the motion for a rehearing. This order was filed, entered and sent to the attorney for the petitioner on January 26, 1949.

Petitioner appealed from the order of September 14, 1948, denying its motion to remove, on October 13, 1948 (Fol. 7).

Petitioner filed and served a Notice of Appeal from the other two orders, denying rehearings, on March 2, 1949 (Fol. 12). This Notice was not served in time, so the appeal from those orders is not effective. See Sec. 2107 of New Title 28, United States Code in effect September 1, 1948.

Petitioner failed to print in the record its application for removal, and the affidavit of Adon W. Crosby, verified January 21, 1949, opposing the second motion for a rehearing. So we printed said papers in a supplemental record (Fols. 189, 192).

Petitioner's appeals were duly brought on for argument before the United States Court of Appeals, Second Circuit. After hearing, the latter Court, on or about November 2, 1949, affirmed the order of the District Court.

Petitioner, later, filed a petition with the United States Court of Appeals, Second Circuit for a rehearing. This petition was denied on or about November 22, 1949.

The Petition for a Writ of Certiorari, together with Record, and the Brief in support thereof, were received by this Respondent, City of Buffalo on or about March 2, 1950.

The Action in County Court Which Petitioner Seeks to Remove.

This action was brought in County Court, Erie County by the City of Buffalo, Plaintiff against the Plainfield Hotel Corporation, Spann Realty Corporation, E. W. Walter, as nominee of Central Hanover Bank and Trust Company, Thomas J. Atcheson, doing business under the assumed name and style of T. J. Atcheson Glass Co., State Tax Commission, The People of the State of New York, Buffalo Sewer Authority, County of Erie, defendants, for the purpose of foreclosing tax liens (for the years 1931 to 1945, both inclusive) against certain vacant property in said City owned by the Spann Realty Corporation (Fol. 58). The petitioner was made a party defendant because, according to the public records, it was the owner of a mortgage, hereinafter described, on said property (Fols. 120, 125).

The Spann Realty Corporation was made a defendant because it owned the property involved in the action. It was a domestic corporation and a resident of the State of New York (Fol. 134). The defendants, E. W. Walter, as nominee of Central Hanover Bank and Trust Company, Thomas J. Atcheson, State Tax Commission, The People of the State of New York, Buffalo Sewer Authority and County of Erie were made parties because they were lienors. They, also, are residents of the State of New York (Fol. 30).

The action was brought pursuant to Article 32 of the Charter of the City of Buffalo (Fol. 58). Section 642 of the Charter makes applicable, to an action of this character, all provisions of law applicable to the foreclosure of mortgages. The summons and complaint and *lis pendens* were filed in the office of the Clerk of Erie County, New York, on the 22nd day of October, 1946. The summons and complaint was served on the petitioner on the 24th day of February, 1947 (Fol. 31). No answer was interposed by any defendant.

The petitioner moved in said County Court to vacate the service of the summons upon it, "on the ground that it was not legally served * * *." This motion, after a hearing, was denied by said County Court by order dated, May 5, 1947. The petitioner appealed from said order to the Appellate Division of the Supreme Court, State of New York, which Court affirmed the order of the County Court (Fols. 46, 47).

Buffalo v. Plainfield Hotel Corp., 273 App. Div. 802.

Petitioner never filed a general notice of appearance (Fol. 27). Neither did it file an answer, nor make any motion addressed to the complaint, except the motion it made, under date of May 25, 1948, to open its default. This motion we later refer to (Fols. 50, 195).

On or about February 10, 1948, this action was referred by said County Court to a referee to hear, try and determine the issues, if any herein, to compute the several amounts due to the plaintiff and to the defendants, County of Erie and Buffalo Sewer Authority on the liens alleged in the complaint; to determine their priority; to examine the plaintiff and the defendants County of Erie and Buffalo Sewer Authority as to payments; to take proof of the

facts and circumstances stated in the complaint. In accordance to this order, a hearing was duly held before said referee, and the referee made his report which is dated April 22, 1948, and filed in the Erie County Clerk's Office on the 30th day of April, 1948; upon said report, said County Court granted a judgment of foreclosure and sale in accordance with the practice of said Court, which judgment was duly entered in the Erie County Clerk's Office on the 30th day of April, 1948 (Fols. 60, 61).

In pursuance to the judgment of foreclosure and sale, the property was advertised to be sold on the 26th day of May, 1948. The petitioner was not legally entitled to notice of this sale. However, F. Dudley Kohler, Treasurer of petitioner, knew from a letter of the Clerk of Erie County, dated May 7, 1948, that the Judgment Roll had been filed on April 30, 1948 (Fol. 48). Said Kohler knew of the sale. He attended same and participated in the bidding (Fol. 62).

On the 25th day of May, 1948, the day before the sale, said Kohler, on behalf of said petitioner, and as treasurer thereof, obtained an order directing the plaintiff to show cause, "why an order should not be made opening the default and the judgment entered thereon and vacating and setting aside the same, why the petitioner should not be granted leave to answer the complaint, and why all proceedings on the part of the plaintiff should not be delayed." Said order contained a stay of proceedings (Fols. 63, 199). This order was granted, by a judge out of court, without notice, and in violation of Rule 260 of Civil Practice (New York State) which rule provides: "No order to stay a sale under judgment for the foreclosure of a mortgage shall be made by a judge out of Court, except on a notice of at least twenty-four hours to the plaintiff's attorney."

The motion was heard on May 25, 1948 by consent, although not returnable until May 27, 1948. F. Dudley Kohth e order of the County Court dated May 25, 1948 as folth eoredr of the County Court dated May 25, 1948 as follows:

> "• • • ORDERED, that the motion of the defendant. Plainfield Hotel Corporation, to open its default and for permission to answer the complaint be and the same is hereby denied." (Fols. 64, 65.)

No proposed answer was served or filed on said motion or at any other time. No defense was set up by affidavit, and no excuse was given for petitioner's default in pleading. It is apparent that the default of the petitioner was deliberate.

The sale was held as advertised. The property was bid in by, and sold to, the City of Buffalo for the sum of $15,000. The sale was attended by said F. Dudley Kohler, Treasurer of the petitioner, who participated in the bidding, his highest bid being the sum of $14,100 (Fol. 62).

An appeal was taken by petitioner from the County Court order of May 25, 1948, which refused to open its default, to the Appellate Division of the Supreme Court. The appeal was heard and the order of County Court affirmed.

See

City of Buffalo v. Spann Realty Corp., 274 App. Div. 1085.

Misstatements of Fact Made by Petitioner.

Petitioner makes several misstatements in the record to which we call attention.

On pages eight and twelve (Fols. 22, 34) is states, it offered payment in full of the taxes being foreclosed. There

is no evidence of this in the record. No such offer or tender was made.

At several points petitioner states or implies it is the owner of the property involved in the action (Fols. 34, 114). Petitioner was a mortgagee, not the owner (Fols. 120, 124). Petitioner sold its mortgage before it made the motion to remove (Fol. 135). It, thus, divested itself of all interest in the property.

On page eight of its brief, and at folio 127 of the record, petitioner speaks of its "proposed answer." No answer, "proposed or otherwise," was served or filed.

On page 43 of the record (Fol. 129) Mr. Kohler, Treasurer of petitioner states he did not know the property was to be sold until the day before the sale. It appears, however, that he had received a letter on May 7, 1948 telling of the entry of judgment on April 30, 1948 (Fol. 49). It further appears, that he participated in the bidding at the sale (Fols. 62, 130).

The Statute Applicable.

This motion to remove was made in August, 1948 (Fol. 3). We, therefore, take it for granted that the statute which governs is Title 28, Section 71, Judicial Code and Judiciary. The material part of Section 71, reads as follows:

> "And where a suit is brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, *at any time before the trial thereof, when it shall be made to appear to said district court* that from prejudice or local influence he will not be able to obtain justice in

such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

Pursuant to this statute, one seeking to remove a suit from a State court to the district court of the United States, must show:

1. That, in such suit, "there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State."

2. That the party seeking to remove suit is a defendant and a citizen of "another State."

3. That application is made "at any time before the trial thereof."

4. That "it shall (on said application) be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court,

5. or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice and local influence, to remove said cause."

New Title 28 Judicial Code.

We are aware that this section has been materially changed by Sec. 1441 *et seq.* of the new Title 28, U. S. Code, which went into effect on September 1, 1948. However the changes do not aid the petitioner. This new Title 28 forecloses the right of petitioner to remove more clearly, perhaps, than does the old law.

To show how little comfort the petitioner could gain from the new law, if it were applicable, we refer to Sec. 1441 (b), and Sec. 1446 (b) of the new title. Sec. 1441 (b) reads in part, "any other such action shall be removeable only if none of the parties in interest properly joined and

served as defendants is a citizen of the State in which such action is brought." The other section (1446 (b)) reads "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later."

See Revisers Notes under these Sections.

In this brief we are assuming that this new law is not applicable to the present case.

POINT I.

It appears from the record herein that the petitioner, Plainfield Hotel Corporation, had no interest in this law suit or its subject matter at the time it made its motion to remove in August, 1948 or at any other time since March 31, 1947.

In the original moving papers, there is no allegation, whatsoever, showing how the Plainfield Hotel Corporation was, if at all, interested in the action or the subject matter thereof (Fols. 30-56, 95).

On the motion for a rehearing, we find the statement made in the affidavit of F. Dudley Kohler, verified October 13th, 1948, viz.: "The plaintiff made the Plainfield Hotel Corporation a defendant, because it had a mortgage lien on the premises" (Fol. 120). This is no statement of petitioner's interest; it is a statement of the plaintiff's reason for making the Plainfield Hotel Corporation a party defendant. Again, in the affidavit of F. Dudley Kohler, verified November 20th, 1948, we find the statement: "Deponent was and is during all the time herein stated, the treasurer of the defendant, Plainfield Hotel Corporation, which held a first mortgage on the property described in the complaint" (Fol. 125). The defendant, significantly,

used the past tense "had" and "held." He, purposely, neglects to say that the Plainfield Hotel Corporation, "is, at present," the holder or owner of a mortgage. These statements are misleading, and, we think intentionally so.

The motion to remove was not made until August, 1948. The petitioner had divested itself of title to the land described in the complaint herein on the 7th day of August, 1940, by deed, to the Spann Realty Corporation, which was dated, June 21st, 1940 and recorded in the Erie County Clerk's Office in Liber 3019 of Deeds at Page 376, (p. 61 of Record). The Spann Realty Corporation gave back to petitioner and to one Charles G. Miller, a mortgage to secure the sum of $11,300, which mortgage was dated August 7th, 1940, and recorded on the same day, in the Erie County Clerk's Office, in Liber 2991 of Mortgages at Page 391. It appears that, later, the petitioner became the sole owner of said mortgage, and then, on March 31st, 1947, sold and assigned said mortgage to the Marion County Tennessee Cooperative Corporation, (p. 62 of Record). The said assignment of mortgage was recorded in the Erie County Clerk's Office on April 11th, 1947 in Liber 3806 of Mortgages at Page 391. It is apparent that the petitioner has had no interest in this action, or its subject matter, since March 31st, 1947; and that this fact was known to F. Dudley Kohler, the moving spirit on this motion to remove. F. Dudley Kohler signed, acknowledged and delivered the said assignment of mortgage as treasurer of said corporation, (p. 63 of Record).

(See affidavit of Adon W. Crosby verified January 5, 1949 at page 62 of Record).

It appears that petitioner has had no interest in the property involved since March 31, 1947. We fail to see, therefore, how it can claim, as it does in its record at page 8, that it is being deprived of its real property without due

process of law. It had no real property, or any interest therein, to be deprived of.

It should be noted that the Marion County Tennessee Cooperative Corporation became the owner of the mortgage in question after the foreclosure had been commenced, and, therefore could not have been made a party defendant. However, it became the owner of petitioner's interest before petitioner made its motion to remove. It does not appear whether or not the Marion County Tennessee Cooperative Corporation had any standing or right to make such a motion. From all that appear it may be a resident of New York State.

POINT II.

The attempt of the petitioner to remove this suit to the United States District Court (whatever the reason) comes too late and therefore must be denied.

This action was brought for the purpose of foreclosing tax liens owned by the City of Buffalo on real property in said City.

The action was started on or about the 10th day of October, 1946, in pursuance of Article 32 of the Charter of the City of Buffalo. The taxes had not been paid on the property involved, from the years 1931 to 1945 both inclusive.

The summons and complaint was served upon the petitioner who was made a defendant in this action because, according to the public records, it then held a mortgage lien on the premises. That on or about the 31st day of March, 1947, (the same day it assigned its mortgage, (Fol. 59)), the petitioner made a motion for an order vacating the service of the summons upon it, on the ground that it was not legally

served; this motion was denied by the County Court; thereupon petitioner appealed to the Supreme Court, Appellate Division, Fourth Department. Said Appellate Division affirmed the order of the County Court.

See City of Buffalo v. Plainfield Hotel Corp., 273 App. Div. 802.

The petitioner never filed a general notice of appearance.

A judgment of foreclosure and sale was duly entered herein in accordance with the practice of the County Court, on the 30th day of April, 1948 (Fol. 61). In pursuance to said judgment the property was duly advertised for sale under the direction of the Referee to sell, and, the property involved was, on or about the 26th day of May, 1948, sold to the City of Buffalo for the sum of $15,000.00, that being the highest sum bid therefor. That said sale was attended by Mr. F. Dudley Kohler, Treasurer of the petitioner, and he participated in bidding for such property; that his highest bid was the sum of $14,100.00 (Fol. 62).

On the day previous to the sale, petitioner obtained an order, signed by Hon. Leslie F. Robinson, Erie County Judge, directing the plaintiff to show cause why petitioner's default should not be opened, why the judgment entered herein should not be vacated, why petitioner should not be granted leave to answer the complaint, and why all proceedings on the part of the plaintiff should not be stayed, and providing that, until the hearing and final determination of said motion and the entry of an order thereon, all proceedings on the part of the plaintiff, be stayed (Fols. 63, 64). This motion was made upon the affidavit of said F. Dudley Kohler, verified May 24, 1948. It was argued before said Judge Robinson by said F. Dudley Kohler, on behalf of said petitioner, and Adon W. Crosby on behalf of the plaintiff. The petitioner's motion was denied. The pe-

titioner appealed to the Appellate Division of the Supreme Court, Fourth Department, where said denial was affirmed (Fol. 65).

See City of Buffalo v. Spann Realty Corp., 274 App. Div., 1085.

It thus appears that this motion to remove was not made until after the "trial" of this action. See Title 28 of Judicial Code (U. S. C. A.) Sec. 71.

The phrase "at any time before the trial", means in this case at least, before the case went to judgment.

In McCallon v. Waterman, (C. C. E. D. Mich.), Fed. Case No. 8,675, the court, interpreting the words "before or at the term at which said cause could be first tried, or before the trial thereof" contained in Section 3 of the Judiciary Act of 1875, said:

> "In a defaulted case there is no trial in the ordinary sense in which that word is used; but at the same time there is undoubtedly a limit to the time within which such a case may be removed to this court * * * The default, which is an admission of the plaintiff's case, stands in the place of a trial in a litigated action, which is only a determination of the issues made by the pleadings of both parties. As vacating a default is a matter of discretion, it seems proper that the discretion of the court, which caused the defaults to be entered, should be invoked to set it aside." 15 Fed. Cases, pp. 1248-1249.

The Court held that the petition for removal was prematurely filed and remanded the case to the State Court for further proceedings. In that case it is said: "Plaintiff's attorney entered the appearance of defendant, July 6, 1876, and on the 22nd day of the same month took his default for not pleading to the declaration." Id., p. 1247.

This case is cited in City of Detroit v. Detroit City Ry. Co., (C. C. E. D. Mich.) 54 F. 1, 8, where it is said:

"If the order *pro confesso* had been taken on a personal and actual service, the argument would have been unanswerable, for it is clear that generally a hearing on a default is a trial, within the meaning of the Removal Act of 1875."

In Neale v. Foster, (C. C. D. Or.), 31 F. 53, petition for removal was made on ground of prejudice and local influence under Section 2 of the Judiciary Act of 1887. Defendant answered and plaintiff replied. The application was denied. The Court said: "The statute provides that it may be made 'at any time before the trial'. Ever since this case was referred to the master, with directions to take the testimony, and find the facts and conclusions of law arising thereon, it has been on trial" (p. 56).

When a party is in default, before he can put himself in a position to ask for the removal of a case to the United States Court, he should first by proper motion, relieve himself of his default. This is what was done in Harter v. Kenochan, 103 U. S. 562.

"The Supreme Court have interpreted this to mean: 'before or at the term at which the cause could first be tried, and before the trial thereof;' and also, as, before or at 'the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations.'" Fisk v. Henarie, 142 U. S. 459, 466.

POINT III.

The application to remove should be denied because "prejudice" or "local influence," as contemplated by the statute, is not shown.

The petitioner states as a ground for asking the removal of this suit, "that on account of prejudice and local influence in favor of plaintiff and adverse to your petitioner,

petitioner will be unable to obtain justice in said County Court of the State of New York, or in any Court of said State to which by the laws thereof, your petitioner may have recourse. That said prejudice or local influence arises from the following facts. That plaintiff is represented by persons of local political influence, and the persons comprising the said Court and its constituents are prejudiced against petitioner because it is a corporation of another state, and local people desire to buy in the property sought to be foreclosed at a very low price on a so-called tax sale" (Fol. 36).

A careful reading of the record indicates, however, that the petitioner's claim of "prejudice and local influence" is really based upon his failure to have matters decided, in the State Courts, in its favor (Fols. 114, 120, 130, 159). It is not alleged that the County Court was, in anyway, biased, or that it made any ruling based upon any improper or ulterior motive. No hostility or feeling against the appellant, on any ones part, has been shown.

See Adelbert College v. Toledo, etc., Ry. Co., 47 Fed. Rep. 836, 843, (1891) where the Court quoted Webster's definition of "prejudice" as follows:

> "An opinion or decision of mind formed without due examination; pre-judgment; a bias, or leaning towards one side or the other of a question from other considerations than those belonging to it; an unreasonable predilection or prepossession for or against anything; especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge."

and then said:

> "It is in this general sense that the removal acts use the word 'prejudice,' and it cannot properly be applied to the solemn judgment of the highest court of a state on the mere ground that said judgment differs from that of the supreme court of the United States on the

same question. The term 'local influence,' if not synonomous with 'prejudice,' manifestly refers to an improper influence exerted by or existing in favor of one side, or against the other, which will prevent the latter from obtaining justice in the state courts. The 'prejudice or local influence' which the law meant to make the grounds of removal may relate to the person of the litigant or the subject-matter of the litigation; but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility in the local community or courts, which will work injustice, or prevent the party seeking a removal from obtaining justice."

The Court "must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that, by reason of those causes (prejudice or local influence), the defendant will not be able to obtain justice in the State Courts." Fish v. Henaire, 142 U. S. 459, 468. To the same effect, see Bellaire v. B. & O. R. R., 146 U. S. 117, 118.

An affidavit that defendant has no acquaintance in the county in which the trial in the state court will be had, and that plaintiff is well known there as a lawyer and politician, having lived and practiced law at the county seat many years, and having been a candidate for the office of attorney general of the state, does not make a case for removal. Dennison v. Brown, (C. C. N. Y. 1189) 38 F. 535.

Where prejudice and local influence are relied on as ground for removal they must be proved to the satisfaction of the federal court. City of Bellaire v. Baltimore & O. R. Co., (Ohio, 1892) 146 U. S. 117, 13 S. Ct. 16, 36 L. Ed. 910.

The application must be supported by such proof as to satisfy the court of the truth of such allegations. Southworth v. Reid, (C. C. Wis. 1888) 36 F. 451.

The court should hear evidence pro and con, if necessary, to decide thereon as to the existence of such preju-

dice or influence, before entertaining jurisdiction on the merits. Carson & Rand Lumber Co. v. Holtzclaw (C. C. Mo. 1889) 39 F. 885, 886.

A simple declaration of an opinion or conclusion in an *ex parte* affidavit which does not disclose the facts upon which the conclusion is founded, should not be accepted as satisfactory evidence of the existence of local prejudice. Schwenk v. Strang (Neb. 1893) 59 F. 209, 19 U. S. App. 300, 8 C. C. A. 92.

The existence of prejudice or local influence which will prevent a defendant from obtaining justice in a state court and authorize removal of the suit into the federal court under this section must be made to appear to such court by proof suitable to the nature of the case. Golightly v. Massachusetts Bonding & Insurance Co. (D. C. Tex. 1924) 295 F. 153. We quote from the opinion in this case as follows:

> "The 'justice' which the defendant must be prevented from obtaining in the state court to entitle him to a removal is certainly not a judgment or decree in his favor. It does not mean any particular result in the case, but it does mean the 'influences' which will operate upon the tribunal during the time of its decision. In other words, every defendant, as well as every plaintiff, for that matter, has the right to obtain a hearing and a decision by a court wholly free from and not exposed to the effect of a prejudice or local influence.
>
> If the United States court is legally, not merely morally, satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain that sort of justice in the state court, then removal will be ordered.
>
> Such legal satisfaction requires some proof suitable to the nature of the case. This proof may be made by affidavits; by oral oath; setting forth a statement of facts which evince, to the mind of the court, the truth of the allegation. City of Detroit v. Detroit (C. C.)

54 Fed. 1; *Ex parte* Pennsylvania, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; City v. Wright (C. C.) 84 Fed. 836."

The Supreme Court of the United States has held in, *In re* Pennsylvania Company (Bradley, J.) reported in 137 U. S. 451, 457, as follows:

"There is another question raised in this case, on which it is proper that we should express our opinion. It arised upon the following words of the Act: 'When it shall be made to appear to said circuit court that from prejudice,' etc. How must it be made to appear that from prejudice or local influence the defendant will not be able to obtain justice in the state court? The Act of 1867 only required an affidavit of the party that he had reason to believe that from prejudice or local influence he would not be able to obtain justice in the state court. Rev. Stat. § 639, art. 3. By the Act of 1887 it must be made to appear to the Court. On this point, also, various opinions have been expressed in the circuit courts. *Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court.* Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person, and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. *The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient.* If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered.

In view of these considerations, we are disposed to think that the proof of prejudice and local influence in this case was not such as the circuit court was bound to regard as satisfactory. The only proof

> offered was contained in the affidavit of the general manager of the defendant corporation, to the effect that, from prejudice and local influence, the Company would not be able to obtain justice in the Court of Common Pleas for Litchfield County, or any other state court to which, etc., We do not say that, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient." (Italics ours.)

In the case at bar, the District Court was not "satisfied, by the proof", offered, of the truth of the allegation that, by reason of "prejudice or local influence", the defendant will not be able to obtain justice in the Courts of the State of New York.

POINT IV.

There is no controversy between the plaintiff and the petitioner.

In making this point, we leave out of consideration for the moment, that the petitioner divested itself of all interest in this suit. We have discussed that in Point I. We refer now to the fact that the petitioner has no defense to the plaintiff's cause of action. It filed no answer.

Under the provision of the act of 1875 authorizing removal of any suit "wherein the amount in dispute," etc., exceeds $500, there must be an actual controversy between the parties to warrant a removal, and consequently there is no right of removal, after a stipulation has been filed in the state court admitting the claim sued upon. Keith v. Levi (C. C. Mo. 1880) 2 F. 743, 1 McCrary, 343.

And where the petition for removal was presented after defendant's time to answer had expired, and he was in default, it was held that there was no controversy between

him and the plaintiff, within the meaning of the statute, so as to make a case for removal. Berrian v. Chetwood (C. C. N. Y. 1881) 9 F. 678.

In Iowa it was held that the act of 1875, providing for removal to the federal courts of civil suits, wherein there is a controversy between citizens of different states, contemplates an actual controversy, and that a suit could not be removed thereunder by a defendant before filing a demurrer or answer. Stanbrough v. Griffin (1879) 52 Iowa 112, 2 N. W. 1011, Flynn v. Des Moines & St. L. Ry. Co. (1884) 63 Iowa, 490, 19 N. W. 312, following Bosler v. Booge (1880) 54 Iowa, 251, 6 N. W. 301.

And in New York it was held where a summons had been served upon a non-resident in New York, and an order obtained for his examination under Section 872 of the N. Y. Code of Civil Procedure, but no complaint filed or served and the defendant appeared generally, and obtained a stay and an order to show cause why the case should not be removed to the U. S. circuit court,—that the proceedings to remove were prematurely taken, and the motion was denied without prejudice to its renewal. Shepard v. Conrad, (N. Y. 1878) 4 Abb. N. C. 254.

POINT V.

Petitioner must, however, under Title 28, Section 71, go further and show that "there is a controversy between a citizen of the state in which the suit is brought–and–a citizen of another state," within the meaning of the cases which have construed said statute.

The construction we refer to, of course, is that enunciated in the case of Cochran v. Montgomery County (1905), re-

ported in 199 U. S. 260, 272. In this case, brought in the City Court of Montgomery, Alabama by an Alabama County against Cochran, a citizen of that state, and a surety company, a Maryland Corporation and surety on Cochran's bond, to recover damages for alleged breaches of the bond, the surety company petitioned for the removal of the case to the Federal Court alleging prejudice and local influence. The case was removed. After trial, judgment was rendered for the plaintiff County, which was affirmed by the Circuit Court of Appeals. On certiorari the Supreme Court reversed the judgment and caused the case to be remanded to the State Court. In its opinion the Supreme Court (Fuller, C. J.) said,

> "The circuit court was of opinion that the words 'any defendant, being such citizen of another state, may remove,' etc., implied that there might be defendants who were not citizens of another state and yet the cause be removable; but while the words, standing alone are susceptible of that construction, we think it was not intended to change the meaning of the terms as previously determined (by the decisions under the act of 1789, and so on down), and that the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is pending and a citizen or citizens of another or other states, and *that the clause did not include cases wherein the controversy was partly between citizens of the same state.* To hold otherwise brings the language of the clause into conflict with the rule that a suit, to be removable, must be within the original jurisdiction of the circuit court, departs from the settled former construction, and ignores the main purpose of the act of 1887, which was to restrict the jurisdiction of the circuit court. Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835, Anderson v. Bowers, 43 Fed. 321; Moon, Removal of Causes, § 189 and notes."

This case, Cochran v. Montgomery County, has since been followed, and expresses the law as it is today.

Armstrong v. Kansas City S. Ry. (C. C. Ark. 1911) 192 Fed. 608.

Indianapolis v. Chase National Bank, 314 U. S. 63.

Brown v. Hecht (D. C. Maryland, 1947) 78 Fed. Supp. 541.

In Armstrong v. Kansas City Southern Ry. Co., 192 Fed. Rep. 615 (Circuit Court, Ark. 1911) (Youmans, D. J.) the Court said, "Another ground on which removal is sought is that of prejudice and local influence against the railway company in the county in which the suit was brought, and in adjoining counties. In the case of Malone v. Richmond & D. R. Co. (C. C.) 35 Fed. 625, in an opinion rendered by Mr. Justice Harlan, this portion of the removal section was construed and applied as follows:

> 'The clause prescribing prejudice or local influence as ground for the removal of a suit "in which there is a controversy between a citizen and the state in which the suit is brought and a citizen of another state," cannot well be separated, in the process of interpretation, from the preceding clause in the same section, which, by referring to the first section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of suit in which the existence of prejudice of local influence, as effecting the right of removal, is of any consequence—that the matter in dispute shall exceed in value $2,000 exclusive of interest and costs.'

The limitation with regard to the amount in controversy was held to apply to that ground of removal. Later, in the case of Cochran v. Montgomery County, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, the rule in the Malone Case was held applicable to all cases involving diversity of citizenship. In the case of Southern Railway Company v. Thomason, 146 Fed. 972, 77 C. C. A. 170, the Court said:

'The settled construction of the act last quoted, under which this case was removed, is, we think, so far as the class of cases removable on the ground of prejudice and local influence is concerned, that they are confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is brought, and a citizen or citizens of another or other state, and it does not include cases wherein the controversy is partly between citizens of the same state.' "

As was said in Indianapolis v. Chase National Bank, 314 U. S. 66, (Frankfurter, J.), "To sustain diversity jurisdiction there must exist an 'actual' Helm v. Zarecor, 222 U. S. 32, 36, 56 L. ed. 77, 80, 32 S. Ct. 10, 'substantial,' Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U. S. 77, 81, 65 L. ed. 145, 148, 41 S. Ct. 39, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Strawbridge v. Curtiss, 3 Cranch (U. S.) 267, 2 L. ed. 435."

POINT VI.

We respectfully submit that no sufficient reason has been advanced to cause this Court to allow a Writ of Certiorari herein; and pray that the petition for such Writ be denied.

No unusual question is presented. The only question is, —Should the action have been removed from the County Court, Erie County, New York, to the United States District Court for the Western District of New York, because of or "on account of prejudice and local influence in favor of plaintiff and adverse to your petitioner * * *." This question was considered three times in the District Court, once on appeal by the United States Court of Appeals,

Second Circuit, and again by the latter Court upon a motion for a rehearing. In each case the question was decided against the petitioner.

The petitioner discusses many points of law in his Brief that are not material to the question here, viz.: Should the suit be reviewed in this Court by Writ of Certiorari? The questions petitioner presents are such as might be discussed before a trial Court, is properly raised. They are not such as will be considered as moving this Court to remove the cause from the State to the Federal Court.

In other words, petitioner has shown no reason why its contentions or defenses, if properly raised, would not have received in the State Courts, the fair and just consideration that is every litigant's due.

Respectfully submitted,

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